Supreme Court, U.S.
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In The

Supreme Court of the United States

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October Term, 1998

Bobby W. Kennedy, Pro Se

Petitioner,

vs.

Daniel S. Goldin, Administrator,
National Aeronautics and Space Administration

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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51 pp

## QUESTIONS PRESENTED

1) Should Certioria be granted for denial of equal protection under law as guaranteed by the U.S. Constitution when a different scale of justice is being used to interpret the discrimination civil rights laws between the U.S. Circuit Courts and the U.S. District Courts to determine these Constitutional rights of groups and individuals throughout the country and a white male, 61 years old, handicapped who has 37 years of meritus service with the U.S. Government Agency NASA who has been discriminated against and denied 65 merit system promotions he had applied for and younger, less qualified, nonhandicapped employees were given positions over the appellant and retaliated against for applying for these promotions as a constitutional right and given punishment of suspensions from work for 21 days, and now a 7 day suspension,denied workman's compensation claims, intentionally exposed to hazarous chemicals, blackballed from all promotions and awards because of affirmative action programs to promote blacks and women, intentional discrimination when the agency and the Justice Department lied to the court and caused the court to rule against the plaintiff, and was the victim of reverse discrimination because the plaintiff had whistleblowed on worker's safety, filed 37 joined EEO complaints and 65 separate EEO complaints on age, handicap, national origin, sex, retaliation, race, color, three MSPB cases, five discrimination lawsuits, and was the victim of obstruction of justice, purjury, conspiracy by the U.S. Attorney, bribery,

QUESTIONS--Continued

fraud, and threat on his life with malice and with reckless indifference to the federal protected right of an aggrieved individual, having the same equal protection under the U.S. Constitution as an employee of a private firm has to a jury trial ?

2) Whether the Circuit Court erred in affirming the District Court granting partial summary judgment when the District Court ruled in favor of the appellee while the case clearly shows retaliation for filing discrimination complaints of age, handicap, race, retaliation, sex, whistleblowing hazards to workers and public's safety suspension from work, breach of contract, removal from Deputy Branch Chief, while the decision maker's motive was to force the petitioner out of government service and the Appeal Court erred in affirming the granting of partial summary judgment on petitioner's claim involving breach of contract concerning the prior EEO settlement agreement and the appeals court rejected that contention and affirmed the grant of summary judgment , but not for the reasons stated in the district court's summary judgement, instead, ruling that summary judgment is not proper because the agreement term that petitioner alleges NASA breached is not contained in the written settlement agreement and ruled under Alabama law an agreement does not have to be in writing , and for the additional reason that the agreement contains a provision specifying an exclusive procedure for remedying a breach by NASA, and petitioner's

## QUESTIONS--Continued

lawsuit is outside terms of that remedy provision overlooking that the petitioner filed a proper complaint within the settlement agreements exclusive procedure for remeding on the breach of contract with the agency as required and appeal to Equal Employment Opportunity Commission and the U.S. Attorney committed perjury to the court in order to win , and the appeals court failed to recognize the perjury because the appeals court had been deceived by the U.S. Attorney into believing that the appellant had not filed the complaint which he had filed ?

## PARTIES TO THE PROCEEDING

Bobby W. Kennedy was the Plaintiff in the lower court proceedingns and the appellant before the United States Court of Appeals for the Eleventh Circuit.

Daniel S. Goldin. By regulation he has been named as the respondent and the Defendant in the case before the lower court proceedings of this case and was the appellee before the United States Court of Appeals for the Eleventh Circuit.

Robert Reich by regulation she has been named as the respondent and the Defendant in the case before the lower court proceedings of this case and was the appellee before the United States Court of Appeals for the Eleventh Circuit.

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BOBBY W. KENNEDY

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DANIEL S. GOLDIN, ADMINISTRATOR FOR THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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## OPINIONS BELOW

On March 26, 1998 the United States Court of Appeals for the Eleventh Circuit issued its opinion, affirming the decision of the District Court. That opinion (3a) was nonpublished.

## JURISDICTION

The Circuit Court rendered its opinion in this case on March 26, 1998. This opinion was not published. Petitioner moved for a Petition For Rehearing and Suggestion of Rehearing En Banc
and it was denied on July 6, 1998. This is the decision sought to be reviewed. The court has jurisdiction to review the judgment of the United States Court of appeals for the Eleventh Circuit by Writ of Certiorari pursuant to 28 U.S.C. 1254(I).

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## STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. S 601, et seq. ("ADEA"), also U.S.C. 621 and 633 (a) et seq.; The Rehabilitation Act of 1973, 29 U.S.C. S 794; Handicap discrimination 29 U.S.C. Section 791, Race and Sex Discrimination 42 U.S.C. S 2000, EEO Reprisal and retaliation under Title VII, Civil Rights Act of 1991, 703 to Title VII, 42 U.S.C. 2000(e)(3), and 2000(e) 16 (c) and 2000(e)(2) Retaliation Employment Discrimination; Title VII, 42 U.S.C. S 2000(e)(2); Sex and Race Discrimination and the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8). Handicap 501, 503, & 504 Rehabiliation Act 1973 ; Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States. 28 U.S.C. Section 1346 et.seq., under Title VII, Civil Rights Act of 1991, Constitutional Torts Breach of Contract Claim.

## STATEMENT OF THE CASE

This action was filed in the United States District Court for the Northern District of Alabama, Middle Division, on December 26, 1995, seeking remedies under The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. S 601, et. seq. ("ADEA"), also U.S.C. 621 and 633(a) et seq.; The Rehabilitation Act 1973, 29 U.S.C. S 794; Handicap Discrimination 29 U.S.C. Section 791, Race and Sex Discrimination 42 U.S.C. S 2000, EEO Reprisal and retaliation under title VII, Civil Rights Act of 1991, 703 to Title VII, 42 U.S.C. 2000(e)(3), and 2000(e) 16(c) and 2000(e)(2) Retaliation Employment Discrimination; Title VII, 42 U.S.C. S 2000(e)(2); Sex and Race Discrimination and The Whistleblower Protection Act, 5 U.S.C. 2302(b)(8), Handicap 501, 503, 504, Rehabiliatin Act 1973; Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, 28 U.S.C. Section 1346 et. seq. under Title VII, Civil Rights act of 1991. Breach of Contract Claim.

Kennedy is a white male, who was born on September 27, 1936. He began working for the National Aeronautics and Space Administratin ("NASA") in October of 1960. The appellant has given 38 years of faithful service to the government where he has received 6 U.S. patents for the government and received many awards for this reason. Kennedy was diagnosed with diabetes in 1984 because of management's harrassment, stress, and retaliation . The plaintiff has filed for 65 positions

and interviewed for most and was denied the position given to younger, nonhandicapped, and some blacks and women that were not qualified. Kennedy alleges that a

> pattern, practice, policy and conspiratorial intent exists of illegal employment practices within the agency [NASA] whereby qualified white, non-minority, male, over forty years of age, handicapped, more qualified, and more experienced employees are routinely non-selected for advancement in favor of younger persons who the agency's desire for a youthful (under forty years of age) nonhandicapped management corps and to meet the agency's desire for "diversity" and that those who file grievances and court suits face retaliation from agency management sources and never being promoted.

The plaintiff claims violations of : (l) the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States : (2) Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. SS 2000e, et seq.; (3) 42 U.S.C. S 1983 and S 1985; (4) SS 501, 502, 503, and 504 of the Rehabilitation Act of 1973 as amended to redress discrimination in employment on the basis of Retaliation, Conspriacy, bribery, fraud, and harrassment thereof, to recover lost wages, lost pension monies and benefits, liquidated damages, reinstatement costs, attorneys fees and other legal and equitable relief as may be necessary and appropriate. Jurisdiction is founded in diversity of citizenship and amound and under the donstitutional

guaranted violations of rights under amendments has been violated by government misconduct, 29 U.S.C. SS 791, 792, and 794 ; (5) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. SS 621, et seq., pursant to 29 C.F.R. S 1614.204 (class complaint) : (6) the Civil Service Reform Act of 1978, 5 U.S.C. SS 2301 , et seq., ("CSRA") ; (7) the Whistleblower Protection Act, 5 U.S.C. SS 1213, et seq.; and (8) state law claims of negligence, libel, breach of contract, and defamation and other claims listed in CV-95-PT3323-M ,(9)The Whistleblower Protectin Act of 1989 (WPA) (Pl.101-12) 5 U.S.C. 2302(b)(8)

The whistleblowing claims are not barred by resjudicata because in earlier case CV-94-N-0016-M, Judge Edwin Nelson ruled that the plaintiff had not exhausted administrative remedies and the plaintiff went back to the MSPB and exhausted administrative remedies and this mix case discrimination and whistleblowing is due to be heard in the U.S. District Court. In CV-94-N-0016-M the U.S. Attorney lied to the U.S. Court of Appeal and committed perjury in 95-6863 in the Brief that stated that the plaintiff did not file a complaint on the breach of contract causing the appeal court to rule that because the plaintiff did not file he lost and that if he had filed he would have won. The appellant filed the complaint on breach of contract and appealed it to the EEOC Case 09120777.

Claims for violation against the plaintiff's rights under 42 U.S.C. S 1983 and S 1985. Kennedy also brings his action directly under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, pursuant to the

authority in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971) , under whistleblowing discrimination and wrongful adverse personnel action, conspiracy, bribery and fraud. As part of this action the plaintiff has now filed complaints 24J, 25J, 26J, 27J, 28J, and 29J which are part of the complaint. The U.S. Attorney and the Agency committed perjury, obstruction of justice, bribery, conspiracy, and the law is sacred and must be abided by.

The Plaintiff further alleges that the defendant's actions were willful, malicious, intentional, and in direct violation of civil rights as guaranteed by the United States Constitution.

Managament has stated publicly that employees are too male, too stale, and too pale and have retaliated because the plaintiff has whistle-blowed about asbestos and other chemical hazards for worker's safety and to the health of the plaintiff and retaliated now because of 65 EEO complaints, breach of contract and filing of lawsuits, performance rating, status demotion, and attempted forced retirement by giving plaintiff a 21 day suspension as a direct retaliation for filing this lawsuit. This reprisal is a prohibited personnel practice for reprisals and whistleblowing for gross management and abuse of authority for disclosure information evidencing a violation of laws, rules, and regulations.

The defendants did negligently or wantonly cause harm by prohibited employment discrimination based on one or the other or more, age, race, color,

religion, sex, national origin, reprisal, retaliation, did negligently or wantonly cause this pain and suffering.

As a proximate consequence of the Defendant's said negligence or wantonness the Plaintiff has been caused to suffer the following injuries and damages.

Plaintiff was disgraced, weakened, and harm to reputation by libel, defamation, defamed causing intense pain, emotional sorrow, distress, anguish, and suffering to a handicapped person. Wherefore Plaintffff damands judgment as against the Defendants jointly and separately in a sum to be named including compensatory damages, punitive damages, interest, and cost of court.

Agency manaagement held meetings to plan a planned management action to recruit and solicite to set up the plaintiff and conspire to violate plaintiffs civil rights.

Witnesses admitted under oath that they were recruited and solicited by agency management to conspire against the plaintiff. Agency management coached and led witnesses and wrote statements for the witness against the plaintiff to violate the plaintiff's civil rights and retaliated against the plaintiff for filing discrimination complaints and lawsuits against the agency.

Management retaliated against the plaintiff for whistleblowing, waste, fraud, and abuse of funds and environmental pollution.

Department of Labor conspired and discriminated along with NASA and its managers and caused the plaintiff depression, sleeplessness, and aggravated the diabetes condition and mental

anguish. Conspired to violate plaintiffs civil rights at the work site and away from work to violate the plaintiff at home even off site telephone and in public places.

Agency representative made cellular phone call from deposition room, U.S. Courthouse, Huntsville, Alabama to witnesses that were being deposed next. Agency denied discovery, ocnducted improper investigation, bribery to force retirement, cover up, set up :

1. Most recent act of retaliation discrimination was to take plaintiff's supervisory title away as Deputy Branch Chief in organization while keeping younger, less qualified supervisors that plaintiff had qualified for their positions when they were announced.

2. ADEA

3. Denied workers compensation claim on nervous breakdown

4. Age and handicap, sex, color, race, retaliation, conspiracy, bribery, fraud, harassment, and non selection on job promotion caused diabetes and depression and mental anquish and continue to harrass and stress a handicap employee.

Require an annual review of all employment activities, to be publically published, which describes all equal employment complaints and the resolution of such complaints by Agency, Center, and Center Organization, and grant all back wages, benefits, pension, awards, and related restitution to the plaintiff plus interest from the date of his respective first initial non-promotin discrimination, and grant the promotions, pay, title, rank, position, related

advancement and/or opportunity selection, educational opportunities, and grant front pay damages for the loss of opportunity in future selections and grant damages for negative effects to health suffered due to stress, anxiety, and worry and to the attendant reduction in life expectancy and grant attorney's fees, costs, and expenses of this action, and grant double damages for the intentional malicious, and willful violation by the defendant and grant any other relief the Honorable Court shall deem just and equitable keeping in mind the relative magnitude of the penalties imposed upon employees found guilty of violating the agency's rules and regulations. Appellant demands trial by struck jury on all issues.

## Statement of the Facts

The district court erred in granting partial summary judgments based upon the presence of disputed factual issues material to Appellant's allegations of employment discrimination and whistleblowing claims have not been adjudicated properly because these new claims in CV-95-S-3233 claims did not come from the same operative nucleus as before Judge Nelson because Judge Nelson ruled that the appellant had not exhausted administrative remedies before MSPB on whistleblowing discrimination and the appellant went back to the MSPB and exhausted administrative remedy and the old whistleblowing discrimination claim and now is legally to be heard in CV-95-S-3321-M case. The appellant went back to MSPB in case

AT-0752-94-0720-I-1 and exhausted administrative remedies and the case was now properly before the court and it should have not been dismissed by a partial summary judgement in CV-95-S-3321-M.

Before this Honorable Court is whether the U.S. Court of Appeals is allowed to make a decision in part based on an untrue evidence statement from the U.S. attorney in their brief and whether the district court erred in granting partial summary judgements on Appellant's claim for breach of an EEO settlement agreement (contract agreement) Appellant's claims brought under 42 U.S.C. Title 7 of 2000 E and S 1983 and S 1985; Appellant's *Biven's* claims brought under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Appellant's claims brought under the Whistleblower Protection Act; all claims related to incidents alleged in administrative EEO complaints filed prior to the two formal complaints of discrimination, dated October 15, 1994, and collectively referred to as "Bobby W. Kennedy No. 25 (J); all claims relating to Appellant's 21-day suspension in June of 1994; all claims relating to the decision of the Merit Systems Protection Board in case number AT-0752-94-0720-I-1; Appellant's claims brought under the Civil Service Reform Act of 1978; any claim based upon a pattern, practice, or policy of discrimination or retaliation that predates August 10, 1995 (the date of entry of final judgment in *Kennedy v. Goldin,* CV-94-N-0016-M); Appellant's claims for compensatory damages, liquidated damages, and attorney's fees under the Age Discrimination in Employment Act ("ADEA"); and

Appellant's claim for punitive damages. Judge Nelson did not rule on the whistleblowing discrimination because he stated in his Memorandum of Opinion the adminis- trative process he ruled that the appellant had not completed administrative process and the appellant went back to the MSPB later and the Merit System Protection Board gave the Appellant permission to file the suit and this was never ruled on by Judge Nelson in CV-94-N-0016-M ; therefore resjudicata could not have been violated as the Appellee claims.

The agency has committed perjury, obstruction of justice,and conspiracy against the plaintiff when the Agency and the U.S. Attorney lied in the Brief to the U.S. Eleventh Circuit Court of Appeals and the Agency tried to bribe the plaintiff by saying they would drop the two suspensions and remove them from his record if he would retire.The plaintiff understands that there is no way of getting out of perjury when perjury has been committed to the courts of this land and res judicata has no legal standing when perjury has been committed in order to win a lawsuit.

The plaintiff has filed approximately 65 claims against NASA for discrimination, whistleblowing, denial of workmans compensation, most of which contains tort claims actions against the United States goverment agency (NASA).

## REASONS FOR GRANTING THE WRIT

## AUGUMENT

1. Should Certioria be granted for denial of equal protection under law as guaranteed by the U.S. Constitution when a different scale of justice is being used to interpret the discrimination civil rights laws between the U.S. Circuit Courts and the U.S. District Courts to determine these Constitutional rights of groups and individuals throughout the country and a white male, 61 years old, handicapped who has 37 years of meritus service with the U.S. Government Agency NASA who has been discriminated against and denied 65 merit system promotions he had applied for and younger, less qualified, nonhandicapped employees were given positions over the appellant and retaliated against for applying for these promotions as a constitutional right and given punishment of suspensions from work for 22 days, and now a 7 day suspension denied workman's compensation claims, intentionally exposed to hazardous chemicals, blackballed from all promotions and awards because of affirmative action programs to promote blacks and women, intentional discrimination when the agency and the Justice Department lied to the court and caused the court to rule against the plaintiff, and was the victim of reverse discrimination because the plaintiff had whistleblowed on worker's safety, filed 37 joined EEO complaints and 65 separate EEO complaints on age, handicap, national origin, sex, retaliation, race, color, three MSPB cases, five discrimination

lawsuits, and was the victim of obstruction of justice, perjury, conspiracy by the U.S. Attorney, bribery, fraud, and threat on his life, with malice and with reckless indifference to the federal protected right of an aggrieved individual, have the same equal protection under the U.S. Constitution as an employee of a private firm has in a jury trial ?

Plaintiff Bobby Kennedy was an unsuccessful candidate for 65 promotions even though he qualified and interviewed and younger people were selected at NASA's Marshall Space Flight Center in Huntsville, Alabama. He filed *pro se* action based upon breach of contract, age, race, and handicap, color, national origin, discrimination as well as whistleblowing claim for reprisal based upon his revealing illegal wrongful conduct by NASA. The U.S. District Court for the Northern District of Alabama, Judge Lynnwood Smith, granted partial summary judgment against Plaintiff. The present appeal involves an interlocatory appeal by the appellant's challenge to the partial summary judgments disposition of his case.

This Honorable Court has the responsibility to Disbarrment and disciplinary action, disbarred or suspended from practice in this court the attorney for the defendant had engaged in conduct unbecoming a member of the Bar of this court. Attorney who is admitted to practice before this court for conduct. The honorable court must take disciplinary action against the defendant attorney for conduct unbecoming a member of the bar by lying to this Honorable Court which cause the court to rule against the appellant and claim res judicata on the

material facts are in dispute .

The partial summary judgment in CV-95-S--3312 was done before the parties met in violation of the Federal Rules of Civil Procedure and was done without discovery being conducted and the plaintiff was not allowed due process to have the facts in the case heard by the judge before the defendant asked for and received a partial summary judgment unjustly and is the subject of this interlocatory appeal.

The court unfairly excluded evidence that the U.S. Attorney lied in the Brief to this Honorable Court in CV-94-N-0016-M and Appeal Case 95-6663 which is a part of this denial or excuse that resjudicata was the basis to reject this appeal on the partial summary judgment in CV-95-S-3233-M on appeal and is the subject of this Writ of Certioari.

The "Operative Nucleus" fails because whistleblowing was not adjudicated properly because in CV-94-0016-M Judge Nelson ruled that the whistleblowing claim had not been exhausted and these claims were authorized to go back to court after exhausting before the MSPB. AT-0752-94-0720-I-l . In AT-0752-94-0720-I-l MSPB judges desicion when they ruled the appellant had not exhausted administrative remedies before OSC and Judge Ronald I. Weiss ruled the appellant had exhausted administrative remedyin a new case AT-3443-98-0118-31 and the appellant had shown a disagreement between the MSPB judges in exhausting administrative remedy that can only be settled by a trial.

Appellant's "breach of contract" claim which relates to "the first ten discrimination complaints

(which) settled with a breach of contract complaint." and this settlement agreement gave the appellant the right if the Agency did not live up to the agreement that the appellant could file a complaint and the appellant filed an EEO complaint and appeal to EEOC and Case NASA DocketNCN-91-MSFC-B024 and EEOC Appeal No. 01920777 attached and summary judgment was granted in favor of defendant in error on that claim in CV-94-N-0016-M and is the subject of this interlocatory appeal on CV-95-0016-M.

In the new whistleblowing complaint and the new EEO complaint in CV-95-S-3312-M filed had nothing to do with the resjudicata because that took place after the lawsuit CV-94-N-0016-M was filed. The agency and the Justice Department lied to the court and said this was resjudicata when the new whistle-blowing complaints and the new EEO complaint were made after the lawsuit CV-94-N-0016-M was filed. These new claims in this case had nothing to do with the CV-94-N-0016-M suit the Agency claimed under res judicata in the CV-95-S-3323-M case on Appeal.

The appellant received authority from the Agency to file this suit on administrative EEO complaints "24J, 25J, 26J, 27J, 28J, and 29J which are part of this complaint." The material fact in dispute can only be settled with a trial by jury,not dismissed by summary judgment. In 24 J , the appellant filed this claim of sexual harrassment against Lewis McMurtrie, Gina Scott, Margo Gillespie, and Cynthia Mason. This claim can not be dismissed by partial summary judgment when the

claim was not reviewed in the partial summary judgment along with 27(J), contain matters related to defendants 21 day suspension . This was not true . Appellant had a new claim and it was specifically against these 4 individuals and was not the same complaint that was the 21 day suspension. Appellant's claim was against those individuals making the false statements against the appellant , a different case, not the same nucleus.

This court also determines that all claims in the six formal complaints which comprise EEO administrative complaint would move forward in the court when the stay in places is lifted.

The appellant went back to the MSPB for a final order on the MSPB claim in case number AT-0752-94-0720-I-1, in which the appellant appealed his 21-day suspension through NASA's administrative hearing process. That proceeding was ongoing when summary judgment was granted in the earlier case on August 10, 1995. The appellant stated that, in the earlier district court action, his "whistleblowing claims were dismissed because administrative remedies had not been exhausted. See decision of 11 circuit court of appeals attach. 95.6863. The appellant went back to the MSPB and requested a decision and the MSPB's final order (dated December 5, 1995), gave the appellant the right to further review in United States District Court,"authorizes the plaintiff to file suit in U.S. District Court, on the whistleblowing, 21 day suspension , discrimination claim, and other claims listed in suit CV-95-S-3213 which had many disputed mateial facts of law and the defendant had misled the

court into believing that this case had been settled and resjudicata ruled it out when this is totally incorrect . These issues in the MSPB case that has satisfied administrative remedies and has not been decided by the district court in CV-94-S-0016-M or CV-95-S-3233-M.

The appellant's augument must not fail, because the "operative nucleus of facts"related to the 21 day suspension have not been presented to a United States District Court concerning whistleblowing and 21 day suspension retaliation in the MSPB case has not been an adjudication on the merits of those claims in a summary judgment in CV-94-S-0016-M and a partial summary. The court has been misled by the defendant that 24 J had been settled when in fact it was a new case of discrimination against the 4 people that filed false affidavits against the appellant's civil rights. Therefore, this court erred in determining that all claims arising out of appellant's 21 day suspension must be dismissed. To this end, all claims related to appellant's case before the MSPB (case Number AT-0752-94-0720-I-l) have not been heard and are due to be dealt with in this case because Judge Nelson in CV-94-S-0016-M ruled that the appellant had not exhausted the whistleblowing claim before the MSPB and the appellant went back to the MSPB and exhausted the whistleblowing claim and are part of this new suit CV-95-S-3321 and cannot be dismissed by the Defendants claiming res judicata because this is a new MSPB decision that brings this case forward because of the ruling of facts to exhaust administrative remedies and whistleblowing in

CV-94-S-0016-M.

Appellant's breach of contract claim is not barred by res judicata because of perjury.

A. Pattern, Practice, and Policy of Discrimination exists as shown in CV-94-S-0016-M and CV-95-S-3321.

CV-94-S-0016-M present claims that have not been settled and CV-95-S-3321 complaints present new claims based on a "pattern, practice, policy, and conspiratorial intent" of discrimination on the basis of age and disability (or handicap) against the appellant and "other similarly situated employees. Accordingly, the doctrine of res judicata bars all claims based on acts of the defendant that occured prior to the entry of judgment in the earlier action on claims that have not been adjudicated or when perjury or obstruction of justice occurs. *See Blair v City of Greenville,* 649 F.2d 365, 367 (5th Cir. 1981).

However, the doctrine does not bar a suit based on acts that have occurred subsequent to the final judgment asserted as a bar. Id. a subsequent wrong constitutes a new cause of action which is what happened in this case. *See Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 75 S.Ct. 865 (1955). Accordingly, the district court erred in holds that summary judgment was to be entered in favor of defendant, to the extent that appellant asserts a claim based upon a conspiracy, pattern, practice, or policy of discrimination or retaliation which dates after August 10, 1995 (the date of final judgment in *Kennedy v. Goldin,* CV-94-N-0016-M) but this earlier decision in CV-94-N-0016-M was flawed by

error and the court being lied to in CV-94-N-0016-M.

These issues are still in the case and will serve the new case criminal charge that could not be dismissed in summary judgment. The District Judge erred in not ordering a grand jury to revisit and identify the conflict of interest, obstruction of justice by Justice Deptment, fraud, bribery, and conspirac and the Justice Department did not do their job in taking these criminal charges of the case to the Grand Jury . MichaelMartin , appellant's second level supervisor, threathened Appellant's life and Grady McMeans and Richard Solomon witnessed this threat.

The court erred in not allowing the case to go to a jury to determine which version of facts are true because the appellee presented one untrue version and the appellant has presented true version submitted by true genuine issues of material fact that are clearly different versions of the facts and different than what the appellee has presented and only a trial by jury can determine which set of genuine issue of material facts of law are correct.

The U.S. Attorney lied in the Brief to this court in CV-94-N-0016-M and the court used this lie as the basis to rule against the appellant.

The agency has consistently lied as in this case and in the new lawsuit . The latest dishonesty involving this case is the agency gave the appellant a 7 day suspension because of this case in October 1997 after he had taken and passed a polygraph test that proved he was telling the truth about the whistleblowing in this case on appeal.

The law is sacred and must be protected and

the truth has been told but the court has not listened. The appellant is Pro Se that may have not been clear in explaining this case but the appellant has told the truth and has explained this case to the best of his ability.

2. Whether the Circuit Court erred in affirming the District Court granting partial summary judgment when the District Court ruled in favor of the appellee while the case clearly shows retaliation for filing discrimination complaints of age, handicap, race, retaliation, sex, whistleblowing hazards to workers and public's safety , suspension from work, breach of contract, removal from Deputy Branch Chief, while the decision maker's motive was to force the petitioner out of government service and the Appeal Court erred in affirming the granting of partial summary judgment on petitioner's claim involving breach of contract concerning the prior EEO settlement agreement and the appeal court rejected that contention and affirmed the grant of summary judgment, but not for the reasons stated by the district court, instead, ruling that summary judgment is not proper because the agreement term that petitioner alleges NASA breached is not contained in the written settlement agreement and ruled under Alabama law an agreement does not have to be in writing, and for the additional reason that the agreement contains a provision specifying an exclusive procedure for remedying a breach by NASA, and petitioner's lawsuit is outside the terms of that remedy provision overlooking that the petitioner filed a proper complaint within the

settlement agreements exclusive procedure for remeding on the breach of contract with the agency as required and appeal to Equal Employment Opportunity Commission and the attorney committed perjury to the court in order to win , and the appeals court failed to recognize the perjury because the appeals court had been deceived by the U.S. Attorney into believing that the appellant had not filed the complaint which he had filed ?

The false statement to the U.S. Eleventh Circuit Court of Appeals from the U.S. Attorney caused a decision in favor of the appellee. This was the basis for the res judicata which the Agency and the United States Attorney claimed which was the reason that caused the claims in the second suit to be denied . This deliberate deception to mislead the court which resulted in the court denying the appellant a favorable decision in the earlier case. This falsification of the record and deception to the United States District Court which ruled that the claims in the second suit were barred by resjudicata and could not be tried in this case was a flawed decision against the appellant in deciding a partial summary judgement against the appellant.

In a brief to the U.S. Eleventh Circuit Court of Appeals in Case 95-6863, April 4, 1996, page 3, paragraph 2, Lines 1-11 and pages 48-49, the U.S. Attorney committed perjury in stating that the appellant did not file a complaint on the breach of contract in a settlement agreement of ten discrimination complaints when the appellant did file the complaint and has a docket case number EEOC Case

No. 01955731 and an agency investigation report NCN-94-MSFC-BO44 and an appeal to the EEOC docket case and a decision. The U.S. Eleventh Circuit Court of Appeals ruled the appellant would have won if he had filed a complaint and stated that the appellant did not file a complaint basing their decision on the U.S. Attorney brief which was a lie and was criminal perjury committed by the U.S. Attorney causing the U.S. Eleventh Circuit Court of Appeal to rule against the appellant when after being showed proof in the appellant's brief and the Rehearing En Banc failed to correct the decision of March 26, 1998 by stating before Anderson, Edmondson, and Brackett, Circuit Judges.

"Bobby Wayne Kennedy appeals the district court's grant of partial summary judgment dismissing a number of his causes of action, arguing that the court erred in its determination that they were barred, respectively, by res judicata, statutory preclusion, statutory limitations on the types of damages recoverable or appellant's failure to comply with statutory requirements. This was an error.

Having reviewed the record and considered the briefs of the parties, we find that the district court appropriately dismissed each claim and affirm for the reasons stated in the district court's order granting partial summary judgement to the defendant by the Appeals Court . The appellant believes there is no statute of limitation when the U.S. Attorney commits perjury to the Appeals Court in a brief when the U.S. Attorney in their claim res judicata using that perjury to win the second case , lied to the Honorable Court stating that the appellant did not file a complaint on

the Breach of Contract settlement agreement causing the court to rule against the appellant when the appellant did file the complaint with the Agency and appealed to the EEOC. The remainder of the claims dismissed in the partial summary judgment were wrongly dismissed in that these claims arose from a new set of discrimination claims with new and totally set of facts that were for new and different job announcements that the appellant had applied for and were not connected to the first lawsuit CV-94-N-0016-M and Appeal Court Case No. 95-6863 except the Whistleblowing claim that the District Court Judge ruled in CV-94-0016-M that the appellant had not exhausted administrative remedies and the appellant went back to the MSPB and satisfied the adminis-
trative remedies and this whistleblowing discrimination case is properly before the court in this case.

There is a difference in the application of Justice and the law in which the U. S. Eleventh Circuit Court of Appeals differ from the other circuits in deciding discrimination cases. I believe the record will show that the U.S. Eleventh Circuit Court of Appeals is way too conservative and has a history of disallowing all appeals on discrimination. All of the claims that are listed in this case grew out of a new nucleus of action of discrimination claims , whistleblowing claims, and workman compensation denial, and retaliation ; and the rule of resjudicata does not apply to the new claims and the breach of contract claim and the older whistleblowing claims grew out of perjury to the court in a brief from the

U.S. Attorney and the old whistleblowing claim was not ruled on in CV-94-N-0016-M because adminstrative remedy according to the court had not been completed.The case went back to this court and res judicata does not apply to the perjury or to administrative remedy satisfying new permission from the MSPB and new EEO discrimination claims to file suit in this case after exhausting administrative remedy in a mixed case.

George McDonough, appellant's 4th level supervisor, who made the agreement that was breeched with the appellant, stated in a court deposition that the appellant could have been led to believe that he would be made a supervisor within two months as part of the settlement agreement. The plaintiff was not made a supervisor and this was the breach of the settlement agreement that the agency did ot live up to. The appellant filed a breach of contract and EEO and whistleblowing complaints when the appellant was given a 21 day suspension, denied workers compensation claims, and retaliated against in many other ways . David Nicholas, appellant's team leader, told the appellant that George McDonough stated in a court deposition in David Nicholas versus Dan Goldin in Huntsville, Alabama in the spring of 1998 that if you file discrimination complaints, that you are blackballed and would never be promoted. David Nicholas stated to the appellant that his attorney, John Benn, told him that the Agency would state that Dr. George McDonough was old and senile and would discredit him after he had worked for the Agency for approximately 40 years and was the highest rated

scientist at Marshall where he was the head of the science and engineering directorate composed of approximately 2500 people. The Agency will do anything to win including perjury and defamation of people's character . None of the 65 people that were promoted over the appellant in jobs that had been announced had never filed an EEO complaint and the plaintiff had filed approximately 65 complaints on employment discrimination.

## CONCLUSION

The U.S. Attorney has committed perjury in order to win and there are many material facts of law in dispute and there is no basis of law for the partial summary judgment and the only way that justice can be served is to rule in favor of the appellant and send the case back to District Court for a civil trial by jury. The appellant asks the Supreme Court to appoint a special prosecutor or have one appointed and investigate the criminal charges in this case and appoint a grand jury to have the criminal charges heard.

Respectively submitted,

Bobby W. Kennedy

Bobby W. Kennedy

APPENDIX A-OPINION ON PETITION FOR REHEARING EN BANC DENIED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
FILED JULY 6, 1998

No. 97-6053

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BOBBY WAYNE KENNEDY Plaintiff-Appellant,

versus

DANIEL S. GOLDIN, Administrator,
Defendant-Appellee,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Defendant.

ON APPEAL from the United States District Court for the Northern of Alabama

Decided and Filed July 6, 1998

ON PETITION(S) FOR HEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th cir., 19__, ___ F.2d ___).

Before : ANDERSON, EDMONDSON and BARKETT, Circuit Judges.

Appendix A

PER CURIAM :

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on reharing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT :

Rosen Barklett
UNITED STATES CIRCUIT JUDGE

APPENDIX B- OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FILED MARCH 26, 1998

No. 97-6053

D.C. Docket No. 95-S-3323-M

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOBBY W. KENNEDY,

Plaintiff-Appellant,

v.

DANIEL S. GOLDIN, Administrator

Defendant-Appellee

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION,

Defendant.

ON APPEAL from the United States District Court for the Northern District of Alabama

Decided and Filed May 20, 1996

Before ANDERSON, EDMONDSONand BARKETT, Circuit Judges.

## Appendix B

PER CURIAM :

Bobby Wayne Kennedy appeals the district court's grant of partial summary judgment dismissing a number of his causes of action, arguing that the court erred in its determination that they were barred, respectively, by res judicata, statutory preclusion, statutory limitations on the types of damages recoverable, or Kennedy's failure to comply with statutory requirements.

Having reviewed the record and considered the briefs of the parties, we find that the district court appropriately dismissed each claim and affirm for the reasons stated in the district court's order granting partial summary judgement to the defendant.

AFFIRMED.

APPENDIX C-ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
FILED MARCH 26, 1998

No. 97-6053

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOBBY W. KENNEDY,

versus Plaintiff-Appellant,

DANIEL S. GOLDIN, Administrator

Defendant-Appellee,

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

Defendant.

for the Northern District of Alabama

ORDER: Decided and Filed March 26, 1998

Appellant's "motion to file record excerpts as they are" is DENIED.

Barkett
United States Circuit Judge

APPENDIX D-JUDGMENT OF THE UNITED STATES COURT OF APPEALS
FILED MARCH 26, 1998

No : 97-6053

Memorandum to Counsel or Parties Listed below:

97-6053 KENNEDY v. GOLDIN

Pursuant to Fed.R.App.P.39, costs taxed against plaintiff-appellant.

Sincerely,

Thomas K. Kahn, Clerk

By : Patty S. Alexander
Deputy Clerk

# APPENDIX E-OPINION OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION FILED DECEMBER 19, 1996

Civil Action No. CV-95-S-3323-M

BOBBY W. KENNEDY,

Plaintiff,

vs.

DANIEL S. GOLDIN, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ; et al.,

Defendants.

## MEMORANDUM OPINION

This action - in which plaintiff alleges that Daniel S. Goldin, the sole remaining defendant, discriminated against him on the basis of "age, race, color, religion, sex, national origin, reprisal, [and] retaliation" (Plaintiff's Complaint, P, 5.) - is before

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By order entered February 29, 1996, this court dismissed defendants Robert Reich (incorrectly identified as "Robert Rice") and "six known and unknown agents in worker's compensation case number 06-0602021." By order entered March 20, 1996, this

court dismissed all remaining defendants except for defendant Danial S. goldin in his capacity as administrator, National Aeronautics and Space Administration.
the court on the following motions : (1) defendant's motion for partial summary judgment ; (2) plaintiff's motion for denial of defendant's partial summary judgment motion; (3) plaintiff's motion for oral arguments and enlargement of time; and, (4) defendant's motion to strike plaintiff's answer. Plaintiff

## I. SUMMARY OF CASE

Because defendant's motion for partial summary judgment only addresses procedural matters, a full recital of the facts is not needed. The facts relevant to the subject motion are as follows. Kennedy is a white male, who was born on September 27, 1936. He began working for the National Aeronautics and Space Administration ("NASA") in October of 1960. Kennedy was diagnosed with diabetes in 1984. Kennedy alleges that a

> pattern, practice, policy and conspiratorial intent exists of illegal employment practices within the agency [NASA] whereby qualified white, non-minority, male, over forty years of age, handicapped, more qualified, and more experienced employees are routinely non-selected for advancement in favor of persons who will fulfill the agency's desire for a youthful (under forty years of age) non-handicapped management corps and to meet the agency's desire for "diversity" and that those who file grievances and court suits face retaliation from agency management sources.

(Plaintiff's complaint, P. 9). Accordingly, Kennedy asserts claims based on violations of: (l) the fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States ; (2) Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. SS 2000e, *et seq. ;* (3) 42 U.S.C. S 1983 and S 1985; (4) SS 501, 502,and 504 of the Rehabilitation Act of 1973, 29 U.S.C. SS 791, 792, and 794; (5) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. SS 621, *et seq.,* pursuant to 29 C.F.R. S 1614.204 (class complaint) : (6) the Civil Service Reform Act of 1978, 5 U.S.C. SS 2301, *et seq.,* ("CSRA") ; (7) the Whistleblower Protection Act, 5 U.S.C. SS 1213, *et seq.;* and, (8) state law claims of negligence, libel, breach of contract, and defamation.

Defendant asserts that several of Kennedy's claims are due to be dismissed for procedural reasons. Additionally, defendant asserts that several of Kennedy's claims have already been litigated in United States District Court in the case of *Kennedy v. Goldin,,* CV-N-0016-M, and are, therefore, barred under the doctrine of res judicata.

## II. KENNEDY'S CONSTITUTIONAL CLAIMS AND S 1983 AND S 1985 CLAIMS

Kennedy alleges that defendant violated his rights under 42 U.S.C. S 1983 and S 1985. Kennedy also brings his action directly under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, pursuant to the authority in *Bivens v. Six Unknown Named Agents*

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The Equal Employment Opportunity Act of 1972 (42 U.S.C. S 2000e-16(c)) brought federal employees within the scope of Title VII. *of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999 (1971).

Initially, this court notes that "S 1983 has no application to the federal government or its officers." *Mays v. United States Postal Service,* 928 F. Supp. 1552, 1557 n.4 ( M.D. Ala. 1996). That statue only provides redress for actions of state or local officials "acting under color of state law." Accordingly, that claim must be dismissed.

Section 1985 (3) does not, by its terms, require "state action." Thus, acts of federal officials are no automatically excluded from its coverage. Nevertheless, Kennedy brings both his S 1985(3) claim and his *Bivens* claims "to redress discrimination in employment on the basis of Age, Handicap, Sex, Color, Race, [and] Retaliation." (Plaintiff's Complaint, P. 3.). Those claims are premised upon identical conduct for which Kennedy seeks redress under his Title VII, ADEA, and Rehabilitation Act claims.

In *Brown v. General Services Administration,* 425 U.S. 820, 835, 96 S.Ct. 1961, 1969 (1976), the Supreme Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." See also *Canino v. United States EEOC,* 707 F.2d 468 (11th Cir. 1983) (holding that former federal employees must bring all employ-

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This court construes plaintiff's S 1985 claim as alleging a violation of 42 U.S.C. S 1985(3), which prohibits conspiracies designed to deprive any person

of "equal protection of the laws," because plaintiff alleges a "conspiratorial intent exists" within the agency. (Plaintiff's Complaint, P. 9.)
ment discrimination claims under Title VII ).
Additionally, the Eleventh Circuit and other circuits have held that the ADEA has similalr preemptive force because it was modeled on, and has a similar purpose to, Title VII. See *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983) ; *Purtill v. Harris,* 685 F.2d 134, 137 (3d Cir. 1981), cert. denied, 462.U.S. 1131, 103 S. Ct. 3110 (1983) ; see also, *Dodson v. United States Army Fin. & Accounting Ctr.,* 636 F. Supp. 894, 895 (S.D. Ind. 1986) ("the ADEA is the exclusive remedy for a federal employee who claims age discrimination).

Courts have also held that "SS 501 and 504 of the Rehabilitation Act adopt the remedies and procedures, and thereby, the preclusive effect, of Title VII; therefore, allegations that state a claim under the Rehabilitation Act are not cognizable under any other provision of federal law." *Taylor v. Garrett,* 1992 WL245933, at *5 (E.D. Pa. 1992); see also, *Johnson v. U.S. Postal Service,* 861 F.2d 1475, 1477 (10th Cir. 1988), cert. denied, 493 U.S. 811, 110 S.Ct. 54 (Rehabilitation Act is the exclusive remedy for handicap discrimination); *Boyd v. United States Postal Service,* 752 F.2d 410, 413 (9th Cir. 1985)(same). Kennedy's *Bivens* claims and his 1985(3) claim are premised on the same conduct for which he seeks relief under Title VII, the ADEA, and the

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See also Oscar Mayer & Company v. Evans, 441 U.S. 750, 756, 99 S.Ct. 2066, 2071 (1979) (instructing that when the legislative history indicates

that the source of a section in the ADEA was a complementary section in Title VII, the two statutes are to be construed consistently).
Rehabilitation Act. Accordingly, this court determines that those three statutory schemes preclude Kennedy's *Bivens* claims and his S 1985 claim and, therefore, those claims are due to be dismissed.

## III. KENNEDY'S STATE LAW TORT CLAIMS

The Supreme Court of the United States has held that a federal court has no subject matter jurisdiction over tort claims against the United States unless the plaintiff has first filed an administrative claim with the concerned agency pursuant to 28 U.S.C. S 2675(a) of the Federal Tort Claims Act, and that claim has been denied or deemed denied by operation of law. *McNeil v. United States,* 508 U.S. 106, 113 S.Ct. 1980 (1993); see also *Lykins v. Pointer, Inc.,*

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5 28 U.S.C. S 2675(a) provides in pertinent part :

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six

months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. 725 F.2d 645, 646-47 (11th Cir. 1984).

The requirement of filing an administrative claim is a jurisdictional prerequisite to suit and cannot be waived. *Brown v. United States,* 838 F.2d 1157, 1163 (11th Cir. 1988) ; *Gregory v. Mitchell,* 634 F.2d 199, 203-04 (5th Cir. 1981). Thus, Kennedy must show proof that he has complied with S 2675(a) in order to bring his tort claims against the United States. *Employees Welfare Committee v. E.H. Daws,* 599 F.2d 1375, 1378 n.6 (5th Cir. 1979) ("Theer must be proof of timely written notice of the claim to the appropriate agency, which appears of record") (citations omitted).

Kennedy has neither alleged, nor presented any evidence that he filed an administrative claim with N.A.S.A., that N.A.S.A. denied the claim, or that six months have passed since a claim was filed. Additionally, defendant presents the declaration of Susan McGuire Smith, the chief Counsel for N.A.S.A.'S Marshall Space Flight Center, who asserts that Kennedy has not filed an administrative claim under the Federal Tort Claims Act. (Second Declaration of Susan McGuire Smith. ) Therefore, Kennedy's state law tort claim are due to be dismissed without prejudice to allow Kennedy to proceed through the proper administrative procedures.

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6.

In Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of

the former Fifth Circuit handed down prior to October 1, 1981.

## IV. RES JUDICATA

Defendant asserts that several of Kennedy's claims in this action were presented in the case of *Kennedy v. Goldin* (CV-94-N-0016-M), in which United States District Judge Edwin L. Nelson granted summary judgment in favor of defendant on all claims. Therefore, defendant asserts that those claims are barred by the doctrine of res judicata.

Res judicata ensures the finality of decisions; under the doctrine, a final judgment on the merits bars further claims by the same parties based on the same cause of action. *Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 22205, 2209 (1979). For a prior judgment to bar a subsequent action, it is firmly established that : (1) the prior judgment must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits ; (3) the parties, or those in privity with them, must be identical in both suits; and, (4) the same cause of action must be involved in both suits. *Ray v. Tennessee Valley Authority,* 677 F.2d 818, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 788 (citing *Stevenson v. International Paper Co.,* 516 F.2d 103, 108 (5th Cir. 1975)).

It is clear that the summary judgment rendered in *Kennedy v. Goldin* (CV-94-N-0016-M) constitutes a judgment on the merits by a court of competent jurisdiction. "A summary judgment motion goes to

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7.

The Eleventh Circuit Court of Appeals affirmed the district court's ruling in an unpublished

opinion. Kennedy v. Goldin, 86 F.3d 1170 (11th Cir 1996).

the merits of the case and because it does not simply raise a matter of abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata." 10 Wright, Miller & Kane, *Federal Practice and Procedure :* Civil 2d S 2712, pp. 584-85 (footnotes omitted). Additionally, this action involves the same parties as the prior case. Thus, the only determination to be made by this court is whether both cases involved the same causes or action.

## A. KENNEDY'S WHISTLEBLOWER CLAIMS AND EEO COMPLAINTS

Kennedy states in his complaint that some of the claims he brings in this action were also presented in CV-94-N-0016-M. The complaint reads :

> This action covers 29 joined complaints of discrimination and whistleblowing with the first ten discrimination complaints settled with a breach of contract complaint and the next total of 23J complaints and the whistleblowing being filed in a court action CV-94-N-0016-M by court order. . . . .As part of this action the plaintiff has now filed complaints 24J, 25J, 26J, 27J, 28J, and 29J which are part of this complaint. The discrimination [complaints] thr[ough] 23J have been appealed to theUnited States Eleventh Circuit Court under case CV-94-N-0016-M.

(Plaintiff's Complaint, at P 8 .)

Because the determination in Kennedy's

earlier case constituted an adjudication on the merits, Kennedy is barred from re-litigating the matters involved in the Administrative EEO complaints filed prior to the four formal complaints of discrimination, dated June 22, 1994, and collectively referred to as "Bobby W. Kennedy No. 24(J)," as well as his claims under the Whistleblower Protection Act. Accordingly, those claims are dismissed with prejudice.

B. Matters Related to the June of 1994 21-day suspension

Defendant asserts that any matters related to the 21-day suspension of Kennedy in June of 1994 are barred by res judicata. "The bar [of res judicata] extends not only to the precise legal theory presented in the previous litigation, but to al legal theories and claims arising out of the same 'operative nucleus of fact '" *Olmstead v. Amoco Oil Company,* 725 F.2d 627, 631 (11th Cir. 1984) (citing *Lovely v. Laliberte,* 498F.2d 1261 (1st Cir.), cert. denied, 419 U.S. 1096,

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8.

See Declaratin of George E. Reese (explaining NASA's designation of formal complaints 24(J) through 29(J), and noting the assigned NASA Docket number for those collections of complaints).

9.

Kennedy was suspended for "[disrespectful conduct and use of insulting language to other persons" because he allegedly made sexually suggestive comments to Ms. Margo Gillespie and Ms. Cynthia Mason, two NASA employees. Kennedy claims that the charges surrounding that suspension constituted a

"set up". (Decision Letter dated June 8, 1994, Declaration of Susan McGuire Smith, Exhibit 2.)
95 S.Ct. 526 (1974). Kennedy discussed that suspension in his affidavit he presented to the court in opposition to the summary judgment motion filed in CV-N-94-0016-M :

> As part of the continued EEO reprisal-retaliation for my having filed previous EEO complaints and for my having engaged in various whistle blowing acts, various individuals within NASA conspired to set me up in an attempt to discredit me by way of inducing two individuals to file false claims against me alleging harassment type action and I received a 21 day suspension for that and I appealed it to the appropriate appellate agency and during the hearing, the administrative agency official in charge of that particular hearing process allowed me the defenses of EEO retaliation and whistle blowing retaliation because of all the facts surrounding my history with NASA leading up to the 21 day suspension.

(Plaintiff's Affidavit in Opposition to Defendant's Motion for Summary Judgment in *Kennedy v. Goldin*, CV-94-N-0016-M, Exhibit C.)

The administrative proceeding Kennedy refers to is that of the Merit Systems Protection Board ("MSPB") in case number AT-0752-94--720-I-1, in which Kennedy appealed his 21-day suspension through NASA's administrative hearing process. That proceeding was ongoing when summary judgment was granted in the earlier case on August 10, 1995. Kennedy asserts that, in the earlier district court action, his "whistleblowing claims were

dismissed because administrative remedies had not been exhausted." (Plaintiff's complaint, P 8.) Thus, Kennedy asserts that the MSPB's final order (dated December 5, 1995), which denied his petition for rreview and notified him of the right to further review in United States District Court, "authorizes the plaintiff to file suit in U.S. District Court." (Id.)

Kennedy's argument must fail, in that, the "operative nucleus of facts" related to his 21-day suspension have already been presented to a United States District Court, and there has been an adjudication on the merits of those claims (summary judgment granted in defendant's favor). Therefore, this court determines that all claims arising out of Kennedy's 21-day suspension in June of 1994 must be dismissed. To this end, all claims related to Kennedy's case before the MSPB (case number AT-0752-94-0720-I-1) are to be dismissed, because that case dealt with the administrative appeal of his 21-day suspension. Accordingly, 5 U.S.C. S 7703 (Judicial review of decisions of the MSPB) is eliminated as a jurisdictional basis for this action.

"[T]he Civil Service Reform Act authorizes judicial review of final decisions by the MSPB." *Vinieratos v. United States Department of the Air*

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10.

The district court in Kennedy v. Goldin, CV-94-N-0016-M, summarily granted summary judgment in defendant's favor on all of plaintiff's claims. The court gave no indication that any of the claims should be dismissed without prejudice, and that opinion has been affirmed by the Eleventh Circuit. Kennedy v. Goldin, Docket No. 95-6863 (entered May 20, 1996). Accordingly, this court

concludes that, in granting summary judgment in the prior action, all claims were dismissed with prejudice. *Force*, 939 F.2d 762, 773 (9th Cir. 1991). The final decision of the MSPB for which Kennedy seeks review is barred by res judicata. Therefore, any potential claims based on the Civil Service Reform Act must also be dismissed.

Kennedy also asserts that his administrative EEO complaints "24J, 25J, 26J, 27J, 28J, and 29J are part of this complaint." (Plaintiff's Complaint, p 8.) Defendant claims that EEO administrative complaint 24(J), and portions of 27(J), contain matters related to defendants 21-day suspension and are also due to be dismissed. EEO administrative complaint 24(J) is comprised of four formal complaints filed by Kennedy on June 22, 1994 in relation to statements made by Lewis McMurtrie, Gina Scott, Margo Gillespie, and Cynthia Mason, accusing Kennedy of sexual harassment. Those charges involve the incidents surrounding Kennedy's 21-day suspension and, therefore, any potential claim based on EEO administrative complaint 24(J) is barred by res judicata. This court also determines that all claims in the six formal complaints which comprise EEO administrative complaint 27(J) , relating to the 21-day suspension. are also barred by res judicata.

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11.

The relevant portions of those complaints are as follows :

I was discriminated against because MSFC employees aceted [sic], made statements and wrote defaming discriminating statements against me which were hearsay and that had no direct knowledge of what they were saying and because of age, race,

APPENDIX F-ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION
FILED DECEMBER 19, 1996

Civil Action No. CV-95-S-3323-M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

BOBBY W. KENNEDY

Plaintiff,

vs.

DANIEL S. GOLDIN, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ; et al.,

Defendants.

ORDER

For the reasons stated in the Memorandum Opinion entered contemporaneously herewith, it is ORDERED that defendant's motion for partial summary judgment is GRANTED. Plaintiff's state law tort claims are DISMISSED without prejudice.

Pursuant to Federal Rule of Civil Procedure 54(b), this court finds there to be no just reason for delay and expressly directs the entry of judgment for

defendant on the following claims : (l) plaintiff's claims brought under 42 U.S.C. S 1983 and S 1985; (2) plaintiff's *Bivens* claims brought under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; (3) plaintiff's claims brought under the Whistleblower Protection Act; (4) all claims related to incidents alleged in administrative EEO complaints filed prior to the two formal complaints of discrimination, dated October 15, 1994, and collectively referred to as "Bobby W. Kennedy No. 25 (J);" (5) all claims relating to plaintiff's 21-day suspension in June of 1994 ; (6) all claims relating to the decision of the Merit Systems Protection Board in case number AT-0752-94-0720-I-l ; (7) plaintiff's claims brought under the Civil Service Reform Act of 1978 ; (8) plaintiff's breach of contract claim ; (9) any claim based upon a pattern, practice, or policy of discrimination or retaliation that predates August 10, 1995 (the date of entry of final judgment in *Kennedy v. Goldin,* CV-94-N-0016-M) ; (10) plaintiff's claims for compensatory damages, liquidated damages, and attorney's fees under the Age Discrimination in Employment Act ("ADEA") ; and, (11) plaintiff's claim for punitive damages.

This court also ORDERS *sua sponte* that, to the extent plaintiff's complaint can be construed as a request for class certification, that request is DENIED.

Plaintiff's motion for denial of defendant's partial summary judgment motion is DENIED. Both aspects of plaintiff's "motion for oral argument in objection to defendant's partial summary judgment motion and enlargement of time" are DENIED.

Finally, in accordance with Federal Rule of

Civil Procedure 7(a), defendant's motion to strike plaintiff's "answer" is GRANTED. The clerk is directed to strike plaintiff's answer, filed on April 19, 1996, from the record.

This action shall proceed on Kennedy's claims based on the issues raised in administrative EEO complaints collectively referred to as 25 (J), 26 (J), those portions of 27 (J) not relating to incidents surrounding plaintiff's 21-day suspension in June of 1994, 28(J), and 29(J), and whether those allegations involve violations of the following three statutes : (1) Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. SS 2000e *et seq.;* (2) the Rehabilitation Act of 1973, 29 U.S.C. SS 791 *et seq.;* and, (3) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. SS 621 *et seq.* Defendant is invited tofile a dispositive motion addressing those claims, if he so chooses.

*DONE this* 19*th* day of December, 1996

Lynwood Smith
United States District Judge